

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA  
MARTINSBURG**

**RICHARD DEVINE,**

Petitioner,

**v.**

**CIVIL ACTION NO.: 3:18-CV-152  
(GROH)**

**MICHAEL MARTIN, Warden,**

Respondent.

**ORDER ADOPTING REPORT AND RECOMMENDATION**

Now before the Court is the Report and Recommendation (“R&R”) of United States Magistrate Judge Robert W. Trumble. Pursuant to this Court’s Local Rules, this action was referred to Magistrate Judge Trumble for submission of a proposed R&R. Magistrate Judge Trumble issued his R&R [ECF No. 15] on April 24, 2019. In his R&R, Magistrate Judge Trumble recommends that the Petitioner’s § 2254 petition be dismissed without prejudice.

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a *de novo* review of the magistrate judge’s findings where objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge to which no objection is made. Thomas v. Arn, 474 U.S. 140, 150 (1985). Failure to file timely objections constitutes a waiver of *de novo* review and of a Petitioner’s right to appeal this Court’s Order. 28.U.S.C. § 636(b)(1); Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); United States v. Schronce, 727 F.2d 91,

94 (4th Cir. 1984).

Objections to Magistrate Judge Trumble's R&R were due within fourteen plus three days of service. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The Petitioner accepted service on April 29, 2019. ECF No. 16. The Petitioner filed his objections on May 13, 2019. ECF Nos. 17, 18. Accordingly, this Court will review the portions of the R&R to which the Petitioner objects *de novo*. The Court will review the remainder of the R&R for clear error.

Magistrate Judge Trumble recommends that the Petitioner's § 2254 petition be dismissed because the Petitioner has not exhausted his state remedies. ECF No. 15 at 6. Specifically, Magistrate Judge Trumble found that the Petitioner filed two petitions for habeas corpus in Randolph County Circuit Court, which were consolidated, and remain pending. Accordingly, the magistrate judge recommended that the action be dismissed without prejudice. The Petitioner does not object to the finding that his petition for habeas corpus remains pending in Randolph County Circuit Court. Rather, the Petitioner states that the Court should appoint him a lawyer and review his claims due to "extraordinary circumstances that qualify for federal attention." ECF No. 17 at 1. However, the law is clear, a federal court cannot entertain a petition for writ of habeas corpus on behalf of a prisoner in State custody unless the petitioner first exhausts his state remedies.

Therefore, upon careful review of the R&R, it is the opinion of this Court that Magistrate Judge Trumble's Report and Recommendation [ECF No. 15] should be, and is hereby, **ORDERED ADOPTED** for the reasons more fully stated therein. Because the Petitioner has not exhausted his state remedies, the Petitioner's § 2254 petition is


**DISMISSED WITHOUT PREJUDICE.**

This matter is **ORDERED STRICKEN** from the Court's active docket.

As a final matter, upon an independent review of the record, this Court hereby **DENIES** the Petitioner a Certificate of Appealability, finding that no juror "would find it debatable whether [this Court] was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The Clerk of Court is **DIRECTED** to mail a copy of this Order to the Petitioner by certified mail, return receipt requested, at his last known address as reflected on the docket sheet.

**DATED:** May 14, 2019



GINA M. GROH  
CHIEF UNITED STATES DISTRICT JUDGE